JAMES L. GLEAVE

IBLA 87-738, 88-80 Decided January 5, 1990

Appeals from decisions of the Utah State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. U MC 154256 through U MC 154266; U MC 161569 through U MC 161582.

IBLA 87-738 affirmed; IBLA 88-80 dismissed.

1. Evidence: Generally--Federal Land Policy and Management Act of 1976: Assessment Work--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Assessment Work

   The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

APPEARANCES: Paul D. Lyman, Esq., Richfield, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

James L. Gleave has appealed from two decisions of the Utah State Office, Bureau of Land Management (BLM), declaring certain mining claims abandoned and void for failure to file evidence of assessment work performed or a notice of intention to hold the claims as required by section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (1982).

The first decision, involving the Nebeker Gleave Nos. 10, 15-17, 37-39, 51-52, and 54-55 mining claims (U MC 154256 through U MC 154266), issued on June 24, 1987. This decision noted that "[n]otice of intention to hold or affidavit of assessment work performed for the assessment year 1979 was not filed." Gleave was further informed that he had 30 days in which to submit information showing that the assessment work had been

timely filed, failing in which the subject mining claims would be "declared abandoned and void without further notice." The second decision, involving the High Grade Nos. 1-11 and the Squatter's Right Nos. 1-3 (U MC 161569 through U MC 161582), issued on July 5, 1987. As in the June 24 decision, Gleave was advised that the affidavit for assessment year 1979 was not timely filed and was afforded a 30-day period in which to submit evidence contravening this determination. Both decisions noted that, at the end of 30 days, the decision would be final and appellants would have an additional 30 days in which to appeal to this Board.

Thereafter, on July 20 and July 21, 1987, appellant filed two documents, both entitled "Notice of Appeal and Statement of Reasons," with the Utah State Office. Upon receipt of the July 20 notice which referenced the Nebeker Gleave claims, BLM immediately forwarded the records pertaining to the June 24, 1987, decision to this Board, where it was docketed as IBLA 87-738. However, with respect to the July 5, 1987, decision, BLM treated the July 21 "Notice of Appeal" as a protest. On October 13, 1987, the State Office rejected the protest and declared the High Grade and Squatter's Right claims abandoned and void by operation of law. Gleave duly appealed from this decision to the Board, where the appeal was docketed as IBLA 88-80. 1/ We have consolidated these two appeals for the purpose of adjudication as they involve the same issues and parties.

In his submissions of July 20 and 21, 1987, appellant asserted that he timely filed affidavits of assessment work performed on the claims in 1979 with the Utah State Office. Appellant contended that both affidavits were mailed on October 15, 1979, and were received by BLM on October 17, 1979, within the filing period. Appellant submitted a copy of a certified mail return receipt which, he asserted, corroborated his contentions.

In its decision rejecting Gleave's protest in IBLA 88-80, BLM addressed appellant's assertion that he had filed the required documents. Thus, BLM noted that while the affidavit of assessment work performed established that the document had been filed with the County Recorder, there was no evidence on the document that it had been filed with BLM. With respect to the return receipt card, BLM noted that while the card did establish that the Utah State Office received something on October 17, 1979, it was insufficient to establish that the assessment work was timely filed "as it appears the filing for notices of location was in that timeframe."

1/ While appellant timely filed a notice of appeal in IBLA 88-80, no statement of reasons was thereafter filed, nor has any justification been tendered for the failure to file a statement of reasons. Therefore, this appeal is subject to dismissal and is hereby dismissed. See, e.g., John R. Lynn, 106 IBLA 317 n.1 (1989), George L. Clay Lee, 70 IBLA 196 (1983). In any event, as indicated in the text of this decision, even had appellant filed a statement of reasons in IBLA 88-80 his appeal would be denied, absent convincing evidence to the contrary.

Prior to consideration of the substantive issues raised by appellant, a procedural issue must be addressed. The June 24 and July 5 decisions
issued by BLM granted the claimant 30 days after receipt within which to submit additional information demonstrating that the notice of assessment work performed or notice of intention to hold the claim had been timely filed in the proper BLM office. Only if BLM did not receive such information within the 30 days as specified would the decisions declaring appellant's mining claims abandoned and void became final and appealable to this Board pursuant to the requirements set forth in 43 CFR 4.411. If, on the other hand, further information was received within 30 days, BLM would render a final and appealable order upon consideration of the additional information.

Thus, these two decisions were essentially interlocutory, and were so recognized by BLM. Despite this, however, upon receipt of appellant's sub-missions, BLM failed to treat appellant's submissions as a protest in IBLA 87-738, but rather proceeded to transmit that case file to the Board as an appeal. This was in error. In Duncan Miller (On Reconsideration), 39 IBLA 312 (1979), this Board noted that the characterization of a submission as either an "appeal" or a "protest" is not controlling with respect to the proper treatment of such a submission by BLM. Rather than treating the submission as an appeal, it is clear that BLM should have considered it a protest. See Randall J. Gerlach, 90 IBLA 338 (1986). Indeed, in IBLA 88-80, BLM correctly treated essentially the same submission as a protest and issued a subsequent decision considering appellant's arguments but reaffirming its conclusion that the claims were abandoned and void.

Where an interlocutory decision by BLM has been docketed as an appeal, the Board would normally remand the matter to BLM with instructions to issue an appealable order. Randall J. Gerlach, supra. However, the Board has also noted that, in those circumstances where it is clear that BLM will not alter its original conclusion, no useful purpose would be served by remanding the case for further consideration. See Benton C. Cavin, 93 IBLA 211 (1986); Julie Adams, 45 IBLA 252 (1980). Thus, in view of the State Office's subsequent decision in IBLA 88-80, it is clear that, should we remand IBLA 87-738 to BLM for reconsideration, the State Office would merely reissue its original decision. Accordingly, we will proceed to a consideration of that appeal at the present time.

[1] With respect to the substance of the decision below, we note that BLM held that the claims were abandoned and void because appellant had failed to file proof of labor for the 1979 assessment year. But, as the Board has noted in the past, there is no statutory requirement that a mining claimant file proof of labor with respect to any specific assessment year. Indeed, we have pointed out that section 314 does not even mention the "assessment year." Buck Wilson, 89 IBLA 143, 146 (1985). Accordingly, the Board has held that while the failure to submit an annual filing under section 314(a) automatically gives rise to a conclusive presumption that the claim has been abandoned (see Red Top Mercury Mines, Inc. v. United States, 887 F.2d 198 (9th Cir. 1989); NL Industries, Inc. v. Secretary of the Interior, 777 F.2d 433 (9th Cir. 1985)), the failure to file a proof of labor for any specific assessment year is merely a curable defect of which

a party must be given notice and an opportunity to correct before a claim can be declared abandoned and void. See Thomas A. Alexander, 108 IBLA 347 (1989); Perry L. Johnson, 57 IBLA 20 (1981); Harry J. Pike, 57 IBLA 15 (1981). In the instant case, since appellant has subsequently submitted proof of labor for the 1979 assessment year, he must be deemed to have cured the regulatory infraction.

This does not end the matter, however, as review of the case file dis-closes that a more substantial statutory impediment exists. Thus, under the provisions of section 314(a) and (b) of FLPMA, 43 U.S.C. § 1744(a) and (b) (1982), holders of mining claims located prior to October 21, 1976, as were the claims involved herein, were required to file on or before October 22, 1979, both copies of location notices and either evidence of annual assessment work performed or a notice of intention to hold the mining claims. A review of the subject case files discloses that while appellant timely filed copies of the relevant location notices as required by section 314(b), there is no evidence that appellant filed the necessary documents under section 314(a). The decision of the State Office should have declared the claims abandoned and void for this reason.

Appellant, in essence, argues that regardless of what the BLM case files presently contain, he did, in fact, timely submit affidavits of labor for his claims prior to October 22, 1979. He bolsters this assertion by submitting a copy of a return receipt card which evidences the receipt by BLM on October 17, 1979, of an envelope mailed by appellant to the Utah State Office. Appellant contends that this establishes that he timely filed the required documents and that BLM must have misplaced them. We do not agree.

As a general rule, there is a presumption of regularity which supports the official acts of public officers in the proper discharge of their official duties. See United States v. Chemical Foundation, 272 U.S. 1 (1926); Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976); H. S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981). In accordance with that presumption, we have long held that, failing substantial corroborating evidence to the contrary, it will be presumed that the absence of a document from a case file establishes that the document was never filed, rather than that it was lost or misplaced by BLM. Elizabeth D. Anne, 66 IBLA 126 (1982); H. S. Rademacher, supra, and cases cited therein.

We have noted, however, that various presumptions of differing import may come into play when an appellant alleges timely transmittal of a document but BLM has no record of its receipt. On the one hand, there is the presumption of regularity. On the other hand, there is the presumption that mail properly addressed, with adequate postage affixed, and deposited in an appropriate receptacle, is duly delivered. In Bernard S. Storper, 60 IBLA 67 (1981), aff'd, Civ.No. 82-0449 (D.D.C. Jan. 20, 1983), we adverted to these potentially conflicting presumptions and noted that the presumption of regularity must, for reasons both of public policy and burden of proof analysis, be accorded priority over the presumption that mail correctly addressed and deposited is timely received.

The presumption of regularity, of course, is rebuttable. Thus, the Board has, in a number of cases, held that an appellant has overcome the presumption of regularity and established that it was "more probable than not" that the missing document was timely filed. See, e.g., Richard A. Willers, 101 IBLA 106 (1988); Elizabeth D. Anne, supra; Pennzoil Co., 64 IBLA 392 (1982); L. E. Garrison, 52 IBLA 131 (1981). But critical to overcoming the presumption of regularity is the submission of evidence which can fairly be said to make the conclusion "more probable than not" that the missing document was, in fact, timely filed.

In the instant case, appellant has submitted a copy of a return receipt card, signed for by an employee of the Utah State Office on October 17, 1979. This return receipt card is certainly probative of the fact that something was received by BLM. The problem, however, is that it does not establish what documents BLM did receive.

The case files show that appellant's notices of location and accom-panying maps were date stamped by BLM at 11 a.m. on October 18, 1979. Unless the affidavits of assessment work were sent in a different envelope than that used to transmit the location notices, a possibility which appellant does not assert, it is almost a certainty that the location notices were contained in the envelope for which appellant has provided proof of receipt. Thus, we are not faced with a situation where the presumption of delivery is colliding with the presumption of regularity. BLM readily admits that the envelope in question was received. Rather, BLM argues, and nothing presented on appeal undermines its contention, that the required affidavits of labor were not included with the documents which it admittedly received. Accord, Neal R. Foster, 88 IBLA 296 (1985); S. H. Partners, 80 IBLA 153 (1984).

Nor do any of appellant's other submissions support a different conclusion. The receipts from BLM upon which appellant also relies merely establish that the location notices were accompanied by the required payment for recordation of $5 per claim. 2/ There was no cover letter detailing a list of documents filed, nor was there any identification on the face of the return receipt card delineating the documents included therein. There is, in short, simply insufficient evidence in the instant case to overcome the presumption of regularity and establish that the required proofs of assessment work performed accompanied the original filings with BLM. We must conclude, therefore, that appellant failed to file either proof of assessment work performed or a notice of intention to hold the
claim prior to October 22, 1979, as required by section 314(a) of FLPMA.

2/ While under recent amendments, effective Jan. 3, 1989, a service charge of $5 per claim is assessed for the cost of processing the annual filings required by section 314(a) (see 53 FR 48876, 48881 (Dec. 2, 1988)), at the time in question there was no charge for the filing of evidence of assessment work. Thus, the receipts for monies tendered which appellant argues support his contention that the annual filings were made actually have no bearing on that question.

The fact that the assessment work was performed and that timely filings have been made in other years has no effect on the conclusive presumption of abandonment which attached upon the failure of appellant to file
evidence of assessment work prior to October 22, 1979. See Arne W. Murto, 88 IBLA 19 (1985); Glenn Kroshus, 87 IBLA 213 (1985). The statute is self-operating and the claims became abandoned when the annual filing was not timely received by BLM on or before October 22, 1979. See Ptarmigan Co., 91 IBLA 113 (1986).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal in IBLA 88-80 is dismissed and the decision of the Utah State Office in IBLA 87-738 is affirmed.

James L. Burski
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge